Supreme Court, U.S.
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No. 05-87

In The
Supreme Court of the United States

THE PEOPLE OF THE
STATE OF COLORADO,

Petitioner,

v.

ROBERT ELIOT HARLAN,

Respondent.

On Petition For A Writ Of Certiorari
To The Colorado Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. As recently re-emphasized in *Ring v. Arizona*, the Sixth and Fourteenth Amendments require that Colorado juries, not judges, make the profoundly moral decision, required under the Eighth Amendment, as to whether death sentences should be imposed. Did the Colorado Supreme Court improperly undermine the jury's constitutional responsibilities under the Sixth and Eighth Amendments in ruling that the mere presence of a Bible during death penalty deliberations automatically prevents a fair decision without finding that jurors rested their moral decisions on biblical code rather than Colorado law?

2. The fact that a constitutional violation may have occurred in a death penalty sentencing proceeding, even one implicating a defendant's Sixth Amendment right to a fair and impartial jury, does not preclude harmless error review. Did the Colorado Supreme Court's process for determining a *per se* prejudice where a Bible was present during the last step of the death penalty deliberations improperly create a new constitutional structural error because it would foreclose or prevent harmless error review in every case where that error occurred?

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PETITION FOR A WRIT OF CERTIORARI

The District Attorney for the Seventeenth Judicial District, on behalf of the People of the State of Colorado, respectfully petitions for a writ of certiorari to review the judgment and opinion of the Colorado Supreme Court entered in this case.

OPINION BELOW

The Colorado Supreme Court's opinion is reported as *In re People v. Harlan*, 109 P.3d 616 (Colo. 2005). A copy is attached as Appendix ("App.") A1-A53. A Copy of the trial court order at issue is attached as App. A54-A97.

JURISDICTION

The Colorado Supreme Court entered its judgment on March 28, 2005, and entered an order denying petitioner's motion for rehearing on April 18, 2005. Colorado invokes the certiorari jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury. . . ."

The Eighth Amendment to the United States Constitution provides: "cruel and unusual punishments [shall not be] inflicted."

The Fourteenth Amendment to the United States Constitution provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. The crimes, convictions, and death sentences at issue.

On February 12, 1994, at approximately 2:00 a.m., Rhonda Maloney finished her shift at Harrah's Casino in Central City, Colorado. She took a shuttle bus to her car, which was in the Golden bus station parking lot, arriving there between 3:00 and 3:30 a.m. At approximately 5:45 a.m., Jacquie Creazzo was driving eastbound on I-76. Taking the ramp onto northbound I-25, Creazzo saw two cars parked on the side of the highway; she slowed down to see if there was a problem or if there had been an accident. Maloney got out of the passenger side of one of the cars and drew Creazzo's attention to her. Creazzo stopped her car slightly past Maloney, and, as Creazzo was backing up, Maloney jumped into the car. *People v. Harlan*, 8 P.3d 448, 458 (Colo. 2000), *cert. denied*, 532 U.S. 979 (2001) ("Harlan I").

Maloney and Creazzo drove northbound on I-25. Robert Harlan began to pursue them in one of the cars

that had been parked by the road. Maloney told Creazzo that she needed help to escape from a man with a gun who was going to kill her and that he had raped her for two hours. *Id.*

As Harlan pursued Creazzo and Maloney, his car drew up alongside Creazzo's and Harlan fired several shots into the car. Several bullets hit Creazzo in the knee, spine, and face. Creazzo lost control of her car, which swerved across the median and stopped on the front lawn of the Thornton Police Department. Harlan parked his car and approached Creazzo and Maloney. Harlan pulled Maloney and her belongings from the car, warning Creazzo not to tell anyone what had happened and threatening to kill her if she did. Harlan then dragged Maloney to his car and drove away. *Id.*

On February 15, 1994, police arrested Harlan in connection with Creazzo's shooting and Maloney's abduction. Harlan's father found evidence that incriminated his son in the murder and turned that evidence over to the police. App., A40. Maloney's body was found on February 19, 1994; an autopsy revealed that she suffered several skull and facial fractures, wounds consistent with sexual assault, and other severe injuries. The autopsy also established that Maloney died from a gunshot wound to the head. *Harlan I*, 8 P.3d at 458.

On June 20, 1995, a jury found Harlan guilty of:

(1) first degree murder of Rhonda Maloney (after deliberation);

(2) criminal attempt to commit first degree murder of Rhonda Maloney, with a special finding that the defendant used, possessed, or threatened the use of a deadly weapon;

> (3) second degree kidnapping of Rhonda Maloney, with a special finding that Rhonda Maloney was a victim of sexual assault and robbery, and that the defendant committed the kidnapping through use of a deadly weapon;
>
> (4) first degree murder of Rhonda Maloney (felony) with the predicate crime of kidnapping;
>
> (5) criminal attempt to commit first degree murder of Jacquie Creazzo, with a special finding that the defendant used, possessed, or threatened the use of a deadly weapon; and
>
> (6) first degree assault of Jacquie Creazzo.

Id., at 459.

On July 1, 1995, the jury sentenced Harlan to death. In making its sentencing findings, the jury found beyond a reasonable doubt that: (1) four statutory aggravating factors applied to Harlan's murder of Rhonda Maloney; (2) Harlan's mitigation evidence did not outweigh those aggravating factors; and (3) death was the appropriate penalty for Harlan's crime.

B. The appellate procedural history and the stage of proceedings when the federal questions sought to be reviewed were raised.

Harlan appealed to the Colorado Supreme Court. On April 20, 2001, the Colorado Supreme Court issued a mandate affirming the sentence and conviction and instructing the District Court to vacate the sentence for one attempted murder count. *Harlan I*, 8 P.3d 448. The trial court's decision on August 20, 2001, disqualifying the Public Defender's Office as Harlan's counsel, was the

subject of the Supreme Court's review in *In re People v. Harlan*, 54 P.3d 871 (Colo. 2002) ("Harlan II").

In October 1995, Harlan's counsel filed a motion to the District Court entitled "Motion to Vacate the Death Sentence Due to Juror's Use of the Bible During Penalty Phase Deliberations" ("the Bible Motion"). App., A98-A117. That motion included an affidavit alleging that some jurors had brought Bibles into their penalty phase deliberations. Harlan claimed that the jurors' purported use of the Bible violated his constitutional rights, specifically, his due process rights, his right to counsel, his right to confrontation, his right to remain silent, his privilege against self-incrimination, his right to trial by jury, his right to compulsory process, his protection against *ex post facto* laws, his equal protection rights, his right to appeal, and his protection against cruel and unusual punishment.

The Bible Motion was not heard until April 2003, after the District Court finally regained jurisdiction from the Colorado Supreme Court. The District Court held an evidentiary hearing beginning on April 14, 2003 and concluding on April 18, 2003, in which testimony concerning incidents surrounding the deliberations in the penalty phase was elicited from investigators and the jurors in the case.

The District Court issued its order on May 23, 2003. The District Court's legal conclusions were based, in part, upon federal constitutional law, guaranteeing the right to a fair and impartial jury. The District Court held that, "The use of these biblical passages violated the Defendant's right to have his sentence decided on the basis of the evidence and the law set forth in the trial court's Instructions of Law." App., A94. The District Court also